

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 30 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 255)
of the Telecommunications Act)
of 1966)
)
Access to Telecommunications)
Services, Telecommunications)
Equipment, and Customer)
Premises Equipment by Persons)
with Disabilities)

WT Docket No. 96-198

To: The Commission

COMMENTS OF GENE A. BECHTEL

1. My credentials for submitting these comments include that facts that (a) I and members of my family experience life-long hearing disabilities, (b) I use hearing aids and other assistive devices in the office, home and while participating in life experiences such as appearances in court rooms and in business conferences, (c) am a member of and active in Self Help for Hard of Hearing People, Inc. (SHHH) and (d) have practiced communications law for more than 35 years gaining experience in FCC rulemaking, policymaking and enforcement activities. I support the comments filed by SHHH in this matter.

I.

Veto power over filing formal complaints
(Notice at ¶147)

2. The notice of proposed rulemaking, at ¶147, proposes a departure from the rules and practices under Section 208 of the Communications Act wherein citizens may no longer file a formal complaint without the consent of the government. The only rationale for this proposal is the unanalytical sentence "...we

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believe the differences between typical common carrier complaints and Section 255 complaints require specifically tailored procedural rules for Section 255 complaints."

3. I shall discuss the procedural rules under Section 208 in relation to enforcement of Section 255 in specific detail in Part II of these comments. But the Commission is not proposing any specific tailoring of procedural rules. It is abolishing a concept that has been around for about a century now that citizens have the right to file complaints before regulatory agencies, not that they must negotiate with an agency for the privilege of doing so.

4. Congress has made the judgment that the mechanism of Section 208 of the Act is available for the enforcement of Section 255. It did so without reservation, exception or caveat. Under Section 208, any party may file a complaint against a common carrier for violation of statutory provisions regarding which Section 208 is an enforcement mechanism. This is a statutory right, arising from the seminal precedent of the Interstate Commerce Act. Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454 (1979); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C.Cir. 1980); American Message Centers v. Sprint Communications Co. L.P., 8 FCC Rcd 5522 (¶6) (Commission 1993); WATS International Corporation v. Group Long Distance (USA), Inc., 11 FCC Rcd 3720 (¶13) (Common Carrier Bureau 1995).

5. The Commission's informal complaint procedures under

Section 208, to be sure, will most likely be useful in the enforcement of Section 255. However, in the Commission's own words, informal complaints "for the most part are correspondence or verbal communications complaining of a carrier's action and do not generally include legal or technical arguments." Amendment of Rules Governing Procedures to be followed where Formal Complaints are filed against Common Carriers, FCC 86-576 (¶2) (Commission, released January 9, 1987). The format and procedure are simple, often involving oral communications, with an option to convert the complaint to a formal one if the informal process does not satisfy the complaining party. 47 C.F.R. §§1.716-718.

6. The Commission's rules governing formal complaints are structured to elicit full factual information and documents relevant to the positions of the parties, with limited and controlled discovery, a litigation status conference amongst the parties and the Commission's staff, and a briefing of the facts and the legal issues for agency decision. 47 C.F.R. §§1.720-735. These formal complaint rules are designed to deal with "technical" and "legal" arguments not susceptible to resolution by an exchange of correspondence and oral communications. Surely no less than informal complaint rules, if not more so, these formal complaint rules constitute an essential, integral part of the framework for implementing the statutory rights of citizens under Section 208 of the Act.

7. Formal complaints may, in due course, be dismissed or denied, of course. But research has disclosed no reported rule,

policy or decision in which a veto power over the very use, itself, of the formal complaint procedure under Section 208 has ever previously been employed by this agency. No such rule, policy or decision has been cited in the notice of proposed rulemaking in support of this unprecedented proposal.

8. What are the "unstated" differences between typical common carrier complaints and Section 255 complaints that require a veto power over Section 255 formal complaints? In the instant notice of proposed rulemaking, at ¶150, the Commission acknowledges "the likely complexity of many Section 255 complaints," proposing a longer time for responding to a Section 255 complaint than allowed for responding to other formal complaints. If the Commission regards a Section 255 complaint as more complex than its typical common carrier complaint cases, then the formal complaint procedure is even more essential -- not less -- to the enforcement of Section 255.

9. From a governmental regulatory point of view, there is no rational distinction to be made between typical common carrier and Section 255 complaints. Both involve telecommunications. Both involve the phenomenon of emerging telecommunications as we enter the 21st century. Both involve "technical" matters including dealing with new technology. Both involve "legal" issues including dealing with the Telecommunications Act of 1996 and its revolutionary impact. Both involve the potential for complex factual analyses and determinations.

10. From a governmental regulatory point of view, it is

difficult to conceive of a Section 255 complaint, for which the Commission has Access Board guidelines and interpretations to assist it, that, administratively or conceptually, is more technical, has more difficult legal issues and requires more complex factual analyses and determinations, than many traditional common carrier proceedings. One can cite, as an illustrative example, this agency's sua sponte investigation and the ensuing multi-issue, multi-defendant 208 formal complaint proceeding reflected in Annual 1988 Access Tariff Filings, 4 FCC Rcd 3965 (Commission 1989) and Allnet Communication Services, Inc. v. National Exchange Carrier Association, 6 FCC Rcd 2608 (Commission 1991).

11. The trend in administrative agencies and in the courts is to resolve individual and industry conflicts by negotiated settlements. It is hoped and anticipated that as conflicts arise between and among telecommunications manufacturers, service providers and users under Section 255, negotiated settlements will play an important part in dissolving impasses and getting on with the business of providing greater telecommunications access to members of the impaired and disabled communities.

12. Negotiated settlements generally require a structure in which the contending parties must face the real world prospect of winning or losing their cause if they do not settle. Formal complaints under Section 208 have historically proven to be a structure that lends itself to negotiated settlements; and that structure should be fully available to facilitate Section 255

negotiated settlements as well. According to Thomas D. Watt, Associate Chief of the Enforcement Division of the Common Carrier Bureau, 40% of formal complaints under Section 208 during the period from 1990 to 1996 were resolved through negotiated settlements.¹ Illustrative examples are settlements of formal complaints in the complex AT&T 56 kilobits per second digital dataphone service proceedings. US Sprint Communications Co. v. AT&T, 3 FCC Rcd 664 (Common Carrier Bureau 1988) and Mutual of Omaha Insurance Co. v. AT&T, 4 FCC Rcd 5362 (Common Carrier Bureau 1989), staff rulings on certain remaining issues in dispute jointly considered and affirmed, 9 FCC Rcd 4801 (Commission 1994).

13. If the Commission has the power to veto the use of a formal complaint under Section 208 to address concerns and issues under Section 255, the Commission can shut off the interplay of litigation by interested parties leading to resolution of issues either by decision or by settlement, and can gut meaningful participation by hearing-impaired citizens in the enforcement of Section 255. This is a power that Congress neither intended nor granted.

¹ Remarks entitled "Use of Informal Dispute Resolution Procedures in Resolving Formal Complaints Filed Against Common Carriers Under Section 208 of the Communications Act of 1934, as Amended," Federal ADR Conference sponsored by the American Arbitration Association and the Federal Bar Association, February 27, 1998, copy attached.

II.
Regulations concerning Section 255 complaints
(Notice at ¶154)

14. The following comments are addressed to the notice of proposed rulemaking, at ¶154, which sets forth a number of proposals and inquiries regarding regulations for Section 255 complaints.

A.
Contents of complaints
(First bulleted item, ¶154)

15. Present Rule 1.716 is suitable to govern informal complaints under Section 255. Present Rule 1.721, as streamlined, is suitable to govern formal complaints under Section 255.

B.
Grant of permission to file a formal complaint
(Second bulleted item, ¶154)

16. For reasons stated in Part I of these comments, the Commission does not have the power to grant or withhold permission to file a formal complaint.

17. The existence or potential existence of multiple complaints by similarly-situated parties may be addressed by consolidation of complaints or by entertainment of properly structured class-action complaints.

C.
Single filing, with choice of procedures to be decided later
(Third bulleted item, ¶154)

18. Proceeding from the premise of a single open-ended filing, the Commission proposes a grid of alternatives to the existing rules. Instead of the option to convert an informal

complaint to a formal complaint the Commission suggests a deadline for the complainant to request a formal-complaint-type proceeding or to request alternative dispute resolution, and ultimately, the Commission would decide whether informal, formal or ADR would be followed. These proposals are infected with the same faulty notion that the FCC can or should preclude parties from choosing a formal complaint procedure.

19. The existing rules, as streamlined, are suitable for Section 255 purposes with regard to informal and formal complaint procedures, i.e., option to convert from informal to formal complaints dating back to the original filing. ADR or less formal measures to facilitate settlement should be implemented with such procedures as have been successful in securing a 40% settlement rate of formal 208 complaints described by Mr. Watt.

D.

Full disclosure of relevant facts and documents
(Fourth bulleted item, ¶154)

20. The existing rules, as streamlined, are suitable to Section 255 purposes.

E.

Joinder of defendants
(Fifth and sixth bulleted items, ¶154)

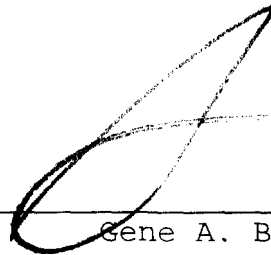
21. The existing rules for joinder of defendants should be broadened for Section 255 complaints as proposed. For Section 255 complaints, the rules should provide for joinder, upon the motion of a party or by the Commission on its own motion, of service providers and/or manufacturers having a common involvement in the subject of the complaint.

F.

Overall view regarding regulations

22. The existing common carrier rules for informal and formal complaints, as streamlined, are suitable for complaints arising under Section 255, except for the limited items referred to above, i.e., consolidating complaints by similarly-situated parties (subpart B) and broadening the provisions regarding joinder of defendants (subpart E).

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'Gene A. Bechtel', written over a horizontal line.

Gene A. Bechtel

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June 30, 1998

**REMARKS BY
THOMAS D. WATT
ASSOCIATE CHIEF, ENFORCEMENT DIVISION
COMMON CARRIER BUREAU
FEDERAL COMMUNICATIONS COMMISSION**

**Before
The American Arbitration Association and
Administrative Law Section of the Federal Bar Association**

**Federal ADR
Rhetoric vs. Reality
Practice vs. Potential**

**Use of Informal Dispute Resolution Procedures
In Resolving Formal Complaints Filed Against
Common Carriers Under Section 208 of the
Communications Act of 1934, as Amended**

[2:15 p.m. - 4:15 p.m. Breakout Session - Enforcement]

Good afternoon. I am pleased to be here today to discuss with you some of the mechanisms available to the Federal Communications Commission for private dispute resolution. I also welcome the opportunity to hear from the other distinguished panelist and members of the audience about their experiences with ADR in enforcement and other contexts.

The FCC has long viewed alternative dispute resolution or "ADR" as an important tool for dealing with private disputes brought to its attention, without the expense and delay that typify adversarial proceedings. The exchange of information and ideas today will help us better shape and administer this important tool.

Following passage of the Administrative Dispute Resolution Act of 1990, the Commission, in June 1991, established a formal ADR Program for use in formal complaints proceedings initiated against common carriers under Section 208 of the Communications Act. As an

employee in the Division at the FCC with primary responsibility for resolving such complaints, I have been involved in administering the program from the outset.

It may surprise some of you to hear that I am not here to talk about the specifics of the FCC's ADR Program. To be honest, we've had only limited success with it for a variety of reasons, most of which I'm confident we'll be able to address in the short term. I do want to share with you some of my experiences with other informal dispute resolution techniques that the Enforcement Division used effectively before the 1990 ADR Act and continues to use with considerable success today. It may be that the success of these informal dispute resolution efforts has diminished the appeal of the agency's more formal ADR Program to many potential participants to some degree.

Some of you may be aware that the FCC, in lieu of promulgating broad rules and policies, has been placing more and more emphasis on the use of the Section 208 complaint process to address marketplace issues. The Section 208 process has traditionally been used to resolve private disputes between competing carriers over the proper application of the Communications Act. Although private in nature, Section 208 complaints can have important implications for other similarly situated carriers who stand to be affected by the precedent that will be established by any FCC decision on the merits of a complaint. Congress recognized the importance of the FCC's complaint process when it passed the Telecommunications Act of 1996. Among other sweeping changes designed to promote full and fair competition in all telecommunications markets, the 1996 Act gave the FCC specific deadlines for resolving certain categories of Section 208 complaints.

In this era of increased reliance on the Section 208 complaint process, the fact that the adjudicative process is, by nature, costly and prone to delay presents a fundamental challenge for the FCC, as well as complainants and defendant carriers. Recently, the FCC attempted to meet this challenge head on by eliminating or curtailing certain discovery procedures and pleading requirements deemed to be unnecessary to a full and fair resolution of Section 208 complaints.

Even under the new streamlined approach, many of us at the FCC are hopeful that parties will view adjudication before the FCC as a last resort for resolving their conflicts. To this end, the rules now include for the first time a requirement that every complainant must include with its complaint, certification that it has attempted in good faith to discuss settlement with the defendant carrier before the complaint was filed with the FCC. A defendant carrier must include a similar certification in its answer to the complaint. Under the rule, a potential complainant must send a certified letter to the defendant carrier that: (1) outlines the specific allegations that form the basis of the complaint it anticipates filing with the FCC and (2) requests a response within a reasonable time.

This straightforward, common sense rule was borne out of years of staff experience facilitating informal dispute resolution in two related contexts. First, experience taught us that many formal complaint cases quickly settle after the staff requires knowledgeable company representatives to meet and exchange relevant information and concerns. In many instances, complainants have stated to us that they believed that filing a formal complaint was the only effective way of getting the defendant carrier to take the dispute seriously.

In some of these same cases, defendant carriers have said that they would have been willing to resolve the dispute before the complaint was filed if the complainant had more clearly articulated its concerns. Thus, the new certification rule is designed to facilitate early discussions between knowledgeable company representatives, a basic tenet of successful dispute resolution in my view. To cite one telling statistic, roughly 40 percent of the formal complaints processed by the Enforcement Division between 1990 and 1996, were resolved through negotiated settlements.

We've also learned that by using the same basic principle of getting knowledgeable company representatives together in an informal setting, disputes between or among carriers can be resolved "before" formal complaints are filed with the FCC. Since 1990, Enforcement Division staff has convened hundreds of confidential meetings and telephone conferences with disputing parties for the purposes of identifying the underlying bases of the dispute and possible

ways to resolve it. In many instances, these informal meetings have been requested by one or both of the disputing parties. In others, the staff has on its own motion requested the parties to appear before it to narrow the issues and explore settlement possibilities.

Whether requested by the staff or sought out by disputing parties, these informal settings have allowed Enforcement Division staff to listen objectively to various technical, legal and policy claims and to offer informal advice on the relative merits of each sides arguments. More often than not, these informal meetings and telephone conferences have produced positive results in the form of either outright settlements or a reduction in the number and scope of issues that require formal pleading by the parties and, ultimately, a decision by the FCC.

In addition, informal meetings and telephone conferences have provided excellent opportunities for the staff to discuss not only the FCC's adjudicative processes with the parties, but also its views about the financial and resource burdens both sides will likely incur in order to present and defend against claims of misconduct. I would be remiss if I did not tell you that staff resource limitations and the FCC's ability to prepare a timely written decision are also factored into these sessions.

Perhaps fittingly given the FCC's role in the in the communications arena, the success of the Division's informal dispute resolution efforts has turned not just on our ability to foster informal channels of communication between disputing parties, but also on our ability keep similar channels open for frank discussions with knowledgeable FCC staff. Unlike the FCC's more formal AD Program, no special forms are required; nor do parties have to endure the sometimes difficult and time consuming task of selecting neutrals to hear their respective claims and arguments. In many instances, informal staff advice is just a phone call away.

In closing, I'd like to emphasize that despite the limited success of the formal ADR Program, the Enforcement Division is committed to using both formal and informal ADR techniques for dealing with disputes that otherwise lead or could lead to costly and time consuming complaint actions. While informal meetings with FCC staff will undoubtedly continue

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to be an attractive tool for many industry participants, they are not a complete substitute for structured arbitration and mediation procedures. Such procedures, if properly implemented, can lead to prompt and effective solutions to conflicts among competing carriers without any involvement by the FCC. Many of you may have heard or read that one of the FCC's goal is to be less regulatory. I would venture to say that this goal would apply to its staff's involvement in conflict resolution as well.

Finally, I want to commend the American Arbitration Association for all of its excellent work in promoting the advantages of ADR. I strongly encourage its continued efforts to make ADR a practical, common sense alternative to costly litigation.

Thank you.